APPENDIX A — MEMORANDUM DECISION FROM THE INDIANA COURT OF APPEALS DATED JUNE 3, 2003

IN THE COURT OF APPEALS OF INDIANA

No. 83A05-0207-CV-335

VERMILLION COUNTY, INDIANA, and BOARD OF COMMISSIONERS OF VERMILLION COUNTY, INDIANA,

Appellants-Defendants,

vs.

SUSAN VICORY, et al.,

Appellees-Plaintiffs.

APPEAL FROM THE VERMILLION CIRCUIT COURT
The Honorable Frank M. Nardi, Judge
Cause No. 83C01-9508-CT-6

June 3, 2003

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

This appeal stems from litigation involving the murders committed by Orville Lynn Majors at the Vermillion County

Appendix A

Hospital. Appellants-defendants Vermillion County, Indiana, and the Board of Commissioners of Vermillion County, Indiana, (collectively, the County defendants) appeal the trial court's denial, in part, of their motion for summary judgment. They argue that the plaintiffs have failed to assert a deprivation of right necessary to maintain a § 1983 claims and that many plaintiffs have failed to satisfy the notice provisions of the Indiana Tort Claims Act, the Wrongful Death Statute, and the statute of limitations for general negligence claims. For those plaintiffs whose claims are not time-barred, the County defendants contend that they have failed to assert a duty necessary to maintain negligence claims.

FACTS

In February 1993 the Vermillion County Hospital (Hospital) hired licensed practical nurse Orville Lynn Majors. The death rate in the ICU, where Orville Lynn Majors worked, climbed from 25 in 1992 to 31 in 1993 to 101 in 1994. While the number of deaths escalated during those years, the number of ICU admittees slightly declined. Almost all the deaths took place on Orville Lynn Majors's shift. Investigators concluded that Majors killed these patients by injecting them with potassium chloride. *See Majors v. State*, 773 N.E.2d 231, 234 (Ind. 2002). He was found guilty of murdering six Hospital patients and is currently serving a 360-year prison sentence. *Id.* at 233.

At the time, Dr. John Albrecht was responsible for general oversight of the ICU. He also served as Chairman of the Hospital's Service of Medicine Committee. One of the

committee's responsibilities was to review the charts of deceased patients. Designated evidence showed that the committee members were not reviewing the charts. Moreover, in his capacity as County Health Officer, Dr. Albrecht signed the death certificates of every deceased Vermillion County resident, including those who had been Hospital patients.

On August 10, 2000, eighty plaintiffs jointly filed their tenth amended complaint for damages to their respective decedent's[1] estates and damages for violations of their constitutional right to familial association. Their claims rest on the allegation that Majors intentionally caused the death of each decedent. The plaintiffs sued various defendants including Dr. Albrecht; the Hospital; Vermillion County, Indiana; and the Board of Commissioners of Vermillion County, Indiana. The complaint brought claims for "negligence," "gross negligence," and "violation of civil rights."

On September 22, 2000, the County defendants filed their second motion for summary judgment.[2] They argued that neither the County nor its Board of Commissioners could be

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1. Seventy-six decedents are represented by a total of eighty personal representatives in this action. Of those decedents, five are represented by two co-personal representatives each. Two decedents, Laura Malkin and Charles Malkin, are represented by the same personal representative, Viola K. Chrimes.

2. The trial court denied the County defendants' first motion for summary judgment. It granted them leave to file a second motion when it was brought to the trial court's attention that its first decision may have relied on an inapplicable Indiana statute.

held liable under § 1983. The County defendants' summary judgment motion raised other contentions, including: plaintiffs' failure to abide by the notice requirement of the Indiana Tort Claims Act (ITCA), failure to file the wrongful death actions within two years of the death of the decedents, and the County defendants' governmental immunity under the ITCA. The trial court granted the County defendants partial summary judgment. Against those plaintiffs who had failed to file any notice of claim under the ITCA, the trial court granted summary judgment on the state-law tort claims only. The County defendants now appeal the denial of the other portions of their motion for summary judgment. Those plaintiffs who failed to file any notice of claim do not challenge the grant of summary judgment to the County defendants.

DISCUSSION AND DECISION

I. § 1983 Claims

The plaintiffs brought claims under § 1983 for the deprivation of their decedents' right to life and for the plaintiffs' right to familial association with the decedents. The plaintiffs assert that the County defendants deprived their respective decedents' of the right to life guaranteed by the Due Process Clause of the Fourteenth Amendment.[3] Correspondingly, the

3. The actual text of the Fourteenth Amendment provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprives any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

US. Const. amend XIV, § 1.

plaintiffs argue that the County defendants deprived them of the "substantive" due process right to familial association with their decedents. Under § 1983, citizens may sue government officials for violations of federal rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983. Both a municipality and a municipal official sued in his official capacity are "persons" amenable to suit under § 1983 for retrospective (monetary) and prospective (injunctive) relief. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978) (holding that § 1983 applies to "municipalities and other local government units"); *Brandon v. Holt*, 469 U.S. 464 (1985) (holding that § 1983 applies to a municipal official sued in his official capacity). Therefore, Vermillion County, as a local government unit, and the Board of Commissioners, as municipal officials sued in their official capacity, are "persons" amenable to suit under § 1983.

Not only must defendants be amenable to suit as § 1983 "persons," the plaintiffs must bring a proper claim. There are two basic elements of a § 1983 claim. "To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that: (1) the defendant deprived the plaintiff of a right secured by the Constitution and the laws of the United States, and (2) the defendant acted under color of state law." *Reed v. City of Chicago*, 77 F.3d 1049, 1051 (7th Cir. 1996).

Any examination of governmental liability for failure to protect a citizen from third-party criminal attacks necessarily begins with *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). In *DeShaney*, the U.S. Supreme Court described the extent of government's responsibility for protecting citizens from one another:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. . . . *Its purpose was to protect the people from the State, not to ensure that the State protected them from each other*. The Framers

> were content to leave the extent of governmental obligation in the latter area to the democratic political processes.

489 U.S. at 195-96 (citations omitted) (emphasis added). The Court ruled: "As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197; *see also Severson v. Bd. of Trs. of Purdue Univ.*, 777 N.E.2d 1181, 1197-99 (Ind. Ct. App. 2002) (holding that university officials and law enforcement organizations did not deprive student or parents of their substantive due process rights by failing to protect student from being murdered by another student), *trans. denied.* There is no due process deprivation even when "state functionaries" stand by and do nothing "when suspicious circumstances dictated a more active role for them." *Id.* at 203.

The Seventh Circuit anticipated the *DeShaney* ruling several years earlier when the court described governmental constitutional liability for the criminal acts of third parties. The Seventh Circuit made clear that a government actor would generally not be held responsible for the criminal acts of third parties:

> There is a constitutional right not to be murdered by a state officer, for the state violates the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process of law. *But there is no constitutional right to be protected by the state*

> *against being murdered by criminals or madmen.* It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.

Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (emphasis added). The *Bowers* court held that the government did not put the victim in the position of danger, rather, it simply failed to adequately protect her as a member of the public. *Id.*

Here, the plaintiffs' claim of deprivation of rights rests on the County defendants' failure to protect Hospital patients from Orville Lynn Majors. The plaintiffs argue, "[T]he County's and the Commissioner's failure to investigate deaths or take proactive actions to protect the patients of Vermillion County Hospital are indeed cognizable violations of the Fourteenth Amendment." Appellees' App. p. 28. Those failures included "the County Health Officer's disregard of the increase in, and failure to investigate, the death rate at Vermillion County Hospital." Appellees' App. p. 31-32. If these allegations are taken as true, the most that can be said is that the County defendants stood by when "suspicious circumstances" would have dictated a more active role. *See DeShaney*, 489 U.S. at 1003. The County defendants, in other words, failed to protect the plaintiffs' decedents who

were at the time "member[s] of the public." *Bowers*, 686 F.2d at 618. Even when the plaintiffs' allegations and the reasonable inferences there from are taken as true, the County defendants were entitled to summary judgment as a matter of law on all the plaintiffs' § 1983 claims.

II. Time-Barred State-Law Tort Claims

According to the County defendants, not only are the federal law claims worthy of summary judgment, but so also are the state-law claims against them. The County defendants make three main arguments—based on timeliness—for the grant of summary judgment on the state-law tort claims in their favor. First, they contend many plaintiffs failed to file notice of claims under the Indiana Tort Claims Act within 180 days of their respective decedent's death. Second, they contend that another class of plaintiffs failed to file their wrongful-death actions within two years of the death of their respective decedents. Third, the County defendants argue that summary judgment should have been granted them on general negligence claims brought by plaintiffs who filed timely notices but not timely causes of action. Summary judgment should have been entered on the general negligence claims, according to the County defendants, because certain plaintiffs made no showing that they could not reasonably have known of the existence of the general negligence claims in time to file a cause of action before the running of the limitations period.

Appendix A

A. Notice of Claim Required by the ITCA

The trial court granted the County defendants' motion for summary judgment in part when it ruled against those plaintiffs who had filed no notice of claim.[4] Its ruling was limited to the state-law claims only; the trial court allowed the plaintiffs to proceed on their § 1983 claims.[5] For those

4. The trial court granted the County defendants summary judgment on all tort claims pursued by the following plaintiffs:

> "Malcolm Aukerman, Rebecca Batson, Robert Meadows, Robin Berg, Loretta Blackburn, Kathryn Bricker, Derek Maxwell II, Viola Chrimes for Laura Malkin, Tonya Cotterell, Mildred Genisio, Micheal Gilman, Roger Griffrn, Bruce Hafner; Brenda Henderson, Lorie Hickman, Evelyn Holbert, James Huxford, John Lee, James Lee, Richard Marshall, Jr.[,] Gloria McGill, Sue Mershon, Rodney Meyers, Normal Miller, Nellie Norman, Lance Pefley, Junior Pressley, Jr., Ethel Richardson, Dom Rolando, Mildred Smith, James Stilwell, David Wheeler, Scott White, Marilyn Whittington and Marilyn Wolfe."

Appellants' Br. p. 37 (alteration added) (quoting the trial court order granting in part and denying in part the County defendants' motion for summary judgment). The plaintiffs do not challenge the trial court's grant of summary judgment against those who failed to file any notice of claim.

5. Tort-claim notice requirements do not apply to § 1983 claims against governmental entities or their officers and employees. *Felder v. Casey*, 487 U.S. 131, 134 (1988). Nevertheless, even when inapplicable to federal claims, notice provisions of the ITCA will (Cont'd)

plaintiffs who undisputedly filed their notices of claim after the 180-day deadline, the trial court ruled that they had substantially complied with the ITCA. Therefore, the County defendants were denied summary judgment on the state-law tort claims asserted by those who had filed notices after the 180-day deadline.

The ITCA establishes a deadline for filing tort claims against political subdivisions:

> Except as provided in section 8 of this chapter, a claim against a political subdivision is barred unless notice is filed with:
>
> (1) the governing body of that political subdivision. . . .
>
> within one hundred eighty (180) days after the loss occurs.

Ind. Code Ann. § 34-4-16.5-7 (West Supp. 1995) (current version at Ind. Code Ann. § 34-13-38 (West 1999)). Vermillion County is a political subdivision according to the ITCA. *See* Ind. Code Ann. § 34-4-16.5-2(f)(1) (West Supp.

(Cont'd)
apply to pendent state-law tort claims made at the same time as the federal claims. *Meury v. Eagle-Union Cmty. Sch. Corp.*, 714 N.E.2d 233, 242 (Ind. Ct. App. 1999), *trans. denied.* Although the ITCA notice requirements do not apply to § 1983 claims, the plaintiff failed to allege a deprivation of right actionable under § 1983. As determined above, the trial court erred in denying the county defendants summary judgment on the § 1983 claims of all plaintiffs and their decedents. *See supra* Part I.

1995) (current version at Ind. Code Ann. § 34-6-2-110(1) (West 1999)). "'Loss' means injury to or death of a person or damage to property." Ind. Code Ann. § 34-4-16.5-2(e) (West Supp. 1995) (current version at Ind. Code Ann. § 34-6-2-75(a) (West 1999)).

If the plaintiff fails to serve a notice of a tort claim within 180 days of his loss, the suit is barred and entry of summary judgment on behalf of the defendant is appropriate. *Wright v. Elston*, 701 N.E.2d 1227, 1233 (Ind. Ct. App. 1998) (citing *Holtz v. Bd. of Com'rs of Elkhart County*, 560 N.E.2d 645, 648 (Ind. 1990) ("We hold that Holtz' allegations bring him squarely within the Tort Claims Act; thus his failure to file within 180 days notice to the Board of Commissioners of Elkhart County requires that the Board's motion for summary judgment be sustained.")), *trans. denied*. In distinguishing between the *timeliness* of the notice and the *content* of the notice, our supreme court stated:

> [A] notice is sufficient if it substantially complies with *the content requirements* of the statute. What constitutes substantial compliance, while not a question of fact but one of law, is a fact-sensitive determination. In general, a notice that is filed within the 180 day period, informs the municipality of the claimant's intent to make a claim and contains sufficient information which reasonably affords the municipality an opportunity to promptly investigate the claim satisfies the purpose of the statute and will be held to substantially comply with it. . . .

Appendix A

> . . . However, where a plaintiff, *within the 180 day period, fails to file any notice of an intent to make a claim*, actual knowledge of the occurrence on the part of the city, even when coupled with an investigation of the occurrence, will not suffice to prove substantial compliance.

Collier v. Prater, 544 N.E.2d 497, 499 (Ind. 1989) (citations omitted) (emphases added).

The plaintiffs who filed their notices, after the 180-day deadline contend that they substantially complied with the ITCA. They cite two cases in support: *City of Hobart Sewage Works v. McCullough*, 656 N.E.2d 1185 (Ind. Ct. App. 1995), and *Board of Aviation Commissioners v. Hestor*, 473 N.E.2d 151 (Ind. Ct. App. 1985). Neither one stands for the proposition advanced by the plaintiffs.

In *McCullough*, the plaintiffs filed a complaint against the City of Hobart with the small claims court 120 days after discovering their property was not connected to city sewage, though they had been paying a monthly sewer assessment. 656 N.E.2d at 1189. The complaint, entitled "Notice of Claim," was served on the City. *Id.* It included the names of the parties involved, a statement of the nature of the plaintiffs' claim, the amount of damages sought, and was served on the City by the sheriff within 180 days of the plaintiffs' last monthly sewage assessment. *Id.* In *McCullough*, the dispute over the notice of claim concentrated on the form and content of the notice not its timeliness. This court held that the plaintiffs had substantially complied with the notice provisions of the ITCA within the 180-day period. *Id.*

Likewise the content of the notice—not timeliness—was the central issue in *Hestor*. The Board of Aviation Commissioners received a "mailgram" dated April 26, 1982, informing it that the plaintiff was suing for a fall she had suffered at the Michiana Regional Airport on October 29, 1981. *Hestor*, 473 N.E.2d at 152. The *Hestor* decision supports the County defendants' argument that a political subdivision must receive notice of a claim within 180 days of a loss. This court in *Hestor* remanded the cause to the trial court for fact-finding on whether the Board of Aviation Commissioners had received the mailgram within 180 days of the plaintiff's fall. *Id.* at 155 ("There are questions remaining as to when the mailgram was received by the Authority and since it was dated April 26, 1982, still within the statutory period, an inference arises that it was received within the statutory period."). In other words, although *the content* of the mailgram substantially complied with the ITCA's notice requirements, a question remained regarding whether the political subdivision received it within 180 days of the plaintiff's loss.

The plaintiffs who filed late notices argue that the County defendants "had ample notice of the suspicious nature of the deaths at the hospital and were placed on notice so that they could investigate plaintiffs' claims and prepare a defense." Appellees' Br. p. 38. To the contrary, there is no designated evidence showing that the County defendants should have assumed that the deaths could possibly be attributed to their negligence. There is no designated evidence showing that the County defendants should have assumed, within 180 days of each death taking place at the Hospital, that they would be sued for the deaths brought about by Orville Lynn Majors.

We hold that the trial court erred in denying summary judgment to the County defendants on the tort claims brought by any personal representative who failed to file a notice of claim within 180 days of his decedent's death.[6]

B. Wrongful Death Statute

The County defendants note that only eleven plaintiffs filed timely notices of claim. Appellants' Br. p. 17. Of those eleven, two plaintiffs failed to file their wrongful death claims within two years of the death of their respective decedents. The Wrongful Death Statute provides in part: "When the death of one is caused by the wrongful act or omission of another, *the action shall be commenced by the personal representative of the decedent within two (2) years. . . .*"

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6. The trial court should have granted the County defendants summary judgment on all the tort claims brought by the following plaintiffs who filed untimely notices of claim:

> Katherine Ahl, Tom Alderson, Timothy L. Areson, Jack Barclay, Veneta Benton, James Bratcher, Charles Catterson, Mildred Cook, Penny Frink, Homer M. Garrigus, Armand Gottardi, Hazel Hale, Claudia Haughee, Elizabeth L. Hiddle, Orville Hornbeck, Pearl Johnson, Lawana Kraemer, John Landsaw, Cheryl Lear and Marlene Stevenson, Mary Snyder and Rita Miller, E. Neil Merritt, Bill Pearman, John Richardson, Larry Roberts, John Rozsa, Norma Mae Siddens, Hilda Simpson, Jerry Sims, Helen Vastine, Susan Vicory, Wayne Walton, Clinton S. Webb, and Orletta Welker.

Appellants' Br. p. 17 (citing Appellants' App. p. 235-340, which contains copies of their tort claims notices).

Appendix A

Ind. Code Ann. § 34-1-1-2 (West Supp. 1995) (emphasis added) (current version at Ind. Code Ann. § 34-23-1-1 (West 1999.)). The wrongful-death cause of action accrues when the injured person dies. *Holmes v. ACandS, Inc.*, 709 N.E.2d 36, 39 (Ind. Ct. App.), *aff'd on reh'g*, 711 N.E.2d 1289 (Ind. Ct. App. 1999), *trans. denied*. Because the right to bring a wrongful death action is purely statutory, having no common law antecedent, "the two year time period within which an action must be commenced is a 'condition attached to the right to sue.'" *Id.* (quoting *General Motors Corp. v. Arnett*, 418 N.E.2d 546, 548 (Ind. Ct. App. 1981)). The two-year period is a "condition precedent" to the very existence of the claim; it is not a statute of limitation. *Id.* In other words:

> "The statute, in fixing the time for commencement of the action, sets up an indispensable condition of the liability of the action that it permits. The statute constitutes an offer of an action on condition that it be commenced within the specified time, *and if the offer is not accepted in the only way in which it can be accepted, by a commencement within the specified time, the action and the right of action no longer exist*."

Bocek v. Inter-Insurance Exch. of Chicago Motor Club, 175 Ind. App. 69, 74, 369 N.E.2d 1093, 1097 (1977) (emphasis added) (quoting 22 Am. Jur. 2d § 35, at 633). For the plaintiffs here who failed to file the wrongful death action within the two years of their decedents' death, the right of action no longer exists.

Appendix A

The plaintiffs contend that the discovery rule applies to all tort claims, including wrongful-death claims. They argue that they did not know of the wrongful nature of the deaths in time to file a cause of action within two years of their respective decedent's death. Nevertheless, they neglect to cite one case applying the discovery rule to wrongful-death actions. Instead, the plaintiffs cite *Ling v. Stillwell*, 732 N.E.2d 1270 (Ind. Ct. App. 2000), *trans. denied*, for the broad principle that, "within the context of the deaths at the Vermillion County Hospital, . . . the discovery rule applies to the facts of these cases." Appellees' Br. p. 40. In *Stillwell*, the Board of Trustees of Vermillion County Hospital appealed the denial of their motion of summary judgment on medical-malpractice claims brought by the son of a deceased Hospital patient. *Id.* at 1272. The central issue was whether the statute of limitations was unconstitutional as applied to the plaintiff's medical-malpractice claim, which was brought after the two-year limitations period. Relying on our supreme court's decisions in *Martin v. Richey*[7] and *Harris v. Raymond*,[8] we held that "application of the occurrence-based two-year statute of limitations would unconstitutionally deprive [the plaintiff] of a medical malpractice claim." *Stillwell*, 732 N.E.2d at 1274. Our decision was limited to medical- malpractice claims where the personal representative could not have reasonably known of the facts giving rise to the medical-malpractice claim within two years of the injury to the decedent. We did not hold, contrary to the position advanced by plaintiffs' attorneys, that the discovery rule applied to all conceivable torts committed at the Vermillion County Hospital.

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7. 711 N.E.2d 1273 (Ind 1999).

8. 715 N.E.2d 388 (Ind. 1999).

The discovery rule does not apply to wrongful-death claims. The trial court erred in denying the County defendants summary judgments on the wrongful-death claims advanced by plaintiffs who failed to file their cause of action within two years of their respective decedent's death.

C. Statute of Limitations for General Negligence Claims

On appeal, the plaintiffs as a whole contend that general negligence claims against the County defendants, in addition to their wrongful-death claims, survive application of the limitations period by virtue of the discovery rule. As noted above, two plaintiffs timely filed their tort claims notice but failed to file their causes of action within two years of their respective decedent's death. General negligence claims on behalf of decedents are subject to a two-year statute of limitations. Ind. Code Ann. § 34-1-2-2(1) (West 1983) (current version at Ind. Code Ann. § 34-11-2-4 (West 1999)). The two plaintiffs—Mary Hedden and Viola K. Chrimes on behalf of Charles Malkin—make no argument showing why they could not reasonably have known of the negligence causes of action before the limitations period had run. Therefore, they may not invoke the discovery rule to maintain general negligence claims against the County defendants.

III. No Duty Has Been Shown

Regardless of whether certain plaintiffs have preserved their causes of action and inasmuch as some plaintiffs have brought timely claims, we will address the merits of the denial of the summary judgment pertaining to negligence claims themselves. The County defendants argue that the trial court

erroneously denied them summary judgment on claims advanced by nine plaintiffs who did give timely notice under the ITCA and filed their wrongful-death actions within two years of their respective decedent's death. In this vein, the County defendants assert that they cannot be held liable through respondeat superior for acts Dr. Albrecht committed in his capacity as doctor is private practice or through their alleged negligent management and control of the Hospital. We will address each argument in turn.

A. Respondeat Superior

To maintain a negligence action, a plaintiff must show: "(1) duty owed to plaintiff by defendant, (2) breach of duty by allowing conduct to fall below the applicable standard of care, and (3) compensable injury proximately caused by defendant's breach of duty." *Bader v. Johnson*, 732 N.E.2d 1212, 1217 (Ind. 2000). A governmental entity's "duty to use ordinary and reasonable care under the circumstances" may be "derivative" through the application of respondeat superior. *Benton v. City of Oakland City*, 721 N.E.2d 224, 228 (Ind. 1999). Under respondeat superior, a governmental employer is held liable for a governmental tortious employee's "actions taken within his scope of employment." *Lake County Juvenile Court v. Swanson*, 671 N.E.2d 429, 438 (Ind. Ct. App. 19796), *trans. denied.*

Here, the plaintiffs argue that the County is liable for the alleged tortious acts of its employee Dr. Albrecht. They maintain that Dr. Albrecht knew of the suspiciously high number of deaths taking place at the Hospital because of his duties as director of the ICU and the medical service

committee. They also contend that Dr. Albrecht, as County Health Officer, signed the death certificates of those deceased patients. In their view, Dr. Albrecht should have acted on the knowledge of the suspicious circumstances as County Health Officer to investigate and then prevent further killings.

The County defendants counter that the deaths at the Hospital were not a result of the alleged tortious actions taken within the scope of Dr. Albrecht's governmental employment as County Health Officer. An examination of the County Health Officer's statutory duties and areas of authority shows that none of his alleged tortious actions (including the failure to act) were taken within the scope of his employment as County Health Officer. The following is a list of some of the County Health Officer's responsibilities and areas of authority:

- make birth or death records, along with vital statistics, and forward them to the state department (Ind. Code § 16-20-1-17 (1993));

- enforce local health laws, ordinances, rules, and regulations (Ind. Code § 16-20-1-19 (1993));

- take any action authorized by statute or rule to control communicable diseases (Ind. Code § 16-20-1-21 (1993));

- may make sanitary inspections and surveys of all public buildings and institutions (Ind. Code § 16-20-1-22(1993));

- may order measures "reasonable and necessary" for the prevention and suppression of disease (Ind. Code § 16-20-1-23 (1993));

- may forbid public gatherings when considered necessary to prevent and stop epidemics (Ind. Code § 16-20-1-24 (1.993.)); and

- order the abatement of conditions that may transmit, generate, or promote disease (Ind. Code § 16-20-1-25 (1993)).

While the County Health Officer is responsible for keeping and forwarding death records, he is not responsible for investigating a suspiciously high number of deaths to reduce a county population's mortality. Each of the other statutory areas of authority and responsibility relate to disease control and prevention—not on investigating deaths having no apparent connection to communicable diseases. Therefore, the County defendants are not liable for Dr. Albrecht's failure to investigate the suspiciously high number of deaths taking place at the Hospital.[9]

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9. Holding the county defendants liable because of Dr. Albrecht's knowledge of the suspiciously high number of deaths gleaned from his private medical practice is tantamount to making all governmental employers liable for their employees' actions or failures to act in roles outside the appointed scope of the employees' public employment. As of 2001, including public school teachers, policemen, and firemen among others, there were 324,447 state and local governmental employees out of a general population of over 6,000,000 Indiana citizens. US. Census Bureau, *2001 Public Employment Data: State and Local Governments: Indiana*, at http://www.census.gov/govs/apes/01stlin.txt (last visited May 5, 2003). Given that one out of twenty Hoosiers is a state or local governmental employee, the potential for respondent-superior liability under the

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Appendix A

B. Management, Control, and Operation of the Hospital

In addition to a "derivative" duty, the plaintiffs assert that the County defendants owed a "direct" duty to investigate and prevent the deaths taking place at the Hospital. *See Benton*, 721 N.E.2d at 228 (distinguishing between a governmental entity's derivative and direct duty). The plaintiffs contend that the County defendants exercised indirect and direct "control and management" of the Hospital to such an extent that the County defendants are liable for the deaths caused by Orville Lynn Majors. As for indirect "control and management," the Board of Commissioners was statutorily responsible for all appointments to the Hospital's governing board. *See* Ind. Code § 16-22-2-6 (1993) (granting the "county executive" the exclusive authority to appoint the members of the governing board of a county hospital which is established "under Acts 1917, c.144, s.1"); Ind. Code § 16-22-2-7 (1993) (allowing for limited expansion of a governing board from appointments made by the county executive). Such a governing board, in turn, "*is the supreme authority in a hospital and is responsible for the management*,

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plaintiffs' proposed rule is enormous. While the potential drain on the public fisc is great, the benefit of reducing the risk of injury is negligible. State and local government employers lack the omniscience necessary to apprehend the behavior of their employees taking place outside the government employer-government employee relationship, not to mention the omnipotence to regulate it. *See generally Palsgraf v. Long Island RR. Co.*, 162 N.E. 99, 100 (N.Y. 1928) ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.").

control, and operation of the hospital." Ind. Code § 16-22-3-1 (1993) (emphasis added). As for direct "management and control," certain rare events pertaining only to the Hospital's very existence required participation by the Board of Commissioners. If the Hospital were to cease doing business or were to transfer management to a nonprofit organization, then the Board of Commissioners would be statutorily obligated to share in such decisionmaking along with the Hospital's governing board. Ind. Code § 16-22-3-17(e) (1993) (dissolution and termination of hospital); Ind. Code § 16-22-3-18 (1993) (transfer of management to nonprofit organization).

As a matter of law, we conclude that the County defendants were not responsible for the general management and control of the Hospital. While the Board of Commissioners appointed the members of the governing board, the Board of Commissioners had no authority to govern the day-to-day operations of the Hospital. According to Indiana law, "supreme authority" for day-to-day decisionmaking rests in the Hospital's governing board, not the Board of Commissioners of Vermillion County, Indiana. *See* Ind. Code § 16-22-3-1 (1993). If the Board of Commissioners has no authority to direct the daily operations of the Hospital, it cannot be said to have a duty to manage and control the Hospital. Likewise, the authority to participate in decisions at extraordinary stages in the Hospital's existence does not confer on the Board of Commissioners the general authority to control and manage the Hospital on a day-to-day basis. To hold otherwise requires a court to contrive a philosophy of liability that bears little resemblance to the practical governance of the Hospital, let alone conformity with the law's allocation of responsibility.

Appendix A

CONCLUSION

In sum, we hold that the trial court correctly granted summary judgment in favor of the County defendants on tort claims brought by plaintiffs who filed no notice of claim. The trial court, however, erred in denying the County Commissioners summary judgment on all the plaintiffs' federal- and state-law claims. First, the plaintiffs failed to assert a deprivation of their constitutional rights necessary to maintain a § 1983 claim. Second, the County defendants should have been awarded summary judgment on all tort claims brought by each plaintiff who failed to file a notice of claim within 180 days of his decedent's death. Third, the County defendants should have been awarded summary judgment on the wrongful-death claim brought by each plaintiff who failed to file his cause of action within two years of his decedent's death. Fourth, the County defendants should have been awarded summary judgment on all negligence claims brought by those plaintiffs who failed to show why the discovery rule avoided application of the statute of limitations. Finally, the County defendants should have been awarded summary judgment on all tort claims timely filed because investigating deaths was not within the scope of the County Health Officer's employment. Additionally, Dr. Albrecht's alleged failures and acts outside the scope of his public employment may not be imputed to his public employment, and the County defendants were not responsible for the day-to-day management and control of the Hospital.

Appendix A

Judgment affirmed in part, reversed in part, and remanded for entry of summary judgment in favor of the County defendants on all the plaintiffs' federal- and state-law claims. SULLIVAN, J. and DARDEN, J., concur.

APPENDIX B — ORDER REGARDING MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANT VERMILLION COUNTY AND THE COMMISSIONERS OF VERMILLION COUNTY DATED AND FILED MARCH 23, 2000

IN THE VERMILLION CIRCUIT COURT

CAUSE NO. 83C01-9508-CT-6

STATE OF INDIANA)
) SS:
VERMILLION COUNTY)

SUSAN VICORY, ET AL.

PLAINTIFFS

VS.

ORVILLE LYNN MAJORS, ET AL,

DEFENDANTS

ORDER REGARDING MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANT VERMILLION COUNTY AND THE COMMISSIONERS OF VERMILLION COUNTY

This cause is now at issue regarding the Motion for Summary Judgment filed herein by defendant Vermillion County and the Commissioners of Vermillion County. The Court conducted and completed a hearing regarding said

Motion and took the same under advisement. The Court, being duly advised, now finds and Orders as follows:

1. There exist genuine issues of material fact which preclude the entry of summary judgment in favor of defendant Vermillion County and the Commissioners of Vermillion County.

2. The Court notes that the defendants have cited the Court to Indiana Code 16-22-2-5(b) for the proposition that the defendants are not responsible for the operation of the county hospital because the authority for the same resides in the board of trustees. This statute, however, provides that the management and control of the hospital is placed with the governing board consisting of the three county commissioners, two appointees of the county fiscal body, and two appointees of the county executive. This statute clearly places the control over the operation of the hospital in the hands of the county commissioners.

3. Additionally, the Court finds that the county health officer is administratively responsible to the county executive and that his duties are as alleged by the plaintiffs in this cause. The county health officer is cloaked with the authority of the county and as alleged by the plaintiffs, the county is liable for his actions in that capacity.

4. The defendants assert that the plaintiffs claims should be barred due to their failure to file tort claim notices under Indiana law. The plaintiffs have submitted proof that the same were filed, however, such notices are not required in Section 1983 actions such as the present action.

5. In regard to the issue of plaintiffs' claim for punitive damages, the Court finds that Indiana Code 34-1-16.5-4, prohibits an award of punitive damages against defendants, Vermillion County and the Board of Commissioners of Vermillion County.

6. The Court denies the defendants' Motion to Strike.

The Court accordingly denies the Motion for Summary Judgment, filed herein by defendants Vermillion County and the Board of Commissioners of Vermillion County in all regards, except in regard to the issue of punitive damages, in which respect the motion is granted.

ALL ORDERED THIS 23rd DAY OF MARCH, 2000.

s/ Frank M. Nardi
FRANK M. NARDI, SPECIAL JUDGE
VERMILLION CIRCUIT COURT

APPENDIX C — ORDER REGARDING SECOND MOTION FOR SUMMARY JUDGMENT FILED HEREIN BY SEPARATE DEFENDANTS VERMILLION COUNTY, INDIANA AND THE COMMISSIONERS OF VERMILLION COUNTY, INDIANA, PARTIAL SUMMARY JUDGMENT, AND NOTICE OF HEARING DATED AND FILED JANUARY 9, 2002

IN THE VERMILLION CIRCUIT COURT

CAUSE NO. 83C01-9508-CT-6

STATE OF INDIANA)
) SS:
VERMILLION COUNTY)

SUSAN VICORY, ET AL.

PLAINTIFFS

VS.

ORVILLE LYNN MAJORS, ET AL,

DEFENDANTS

ORDER REGARDING SECOND MOTION FOR SUMMARY JUDGMENT FILED HEREIN BY SEPARATE DEFENDANTS VERMILLION COUNTY, INDIANA AND THE COMMISSIONERS OF VERMILLION COUNTY, INDIANA, PARTIAL SUMMARY JUDGMENT, AND NOTICE OF HEARING

Appendix C

This cause is now at issue regarding the Second Motion for Summary Judgment filed herein by separate defendants, Vermillion County, Indiana, and the Commissioners of Vermillion County, Indiana. The Court conducted and completed a hearing on said Second Motion and took the same under advisement. The Court, being duly advised, now finds and Orders as follows:

1. This Court entered its prior ruling on the first Motion For Summary Judgment filed by these defendants on March 20, 2000.

2. After Court entered said Order, the defendants moved the Court to reconsider its ruling, which request the Court granted over the vehement objection of the plaintiffs.

3. Both parties have correctly cited the Court to the standards which the Court must apply in ruling upon a motion for summary judgment, which standards do not need to be repeated here. It is this Court's opinion that a summary judgment is a drastic measure, which terminates a cause without the opportunity to weigh the credibility of witnesses and weigh all of the evidence in a full and open adversarial setting. Summary judgment should only be used to terminate a cause of action when it is clearly established that no genuine issues of material fact exist and that one party is entitled to judgments as a matter of law. The rationale of Trial Rule 56 assumes that there exists no reason to delay in the entry of judgment so as to terminate unfounded litigation.

4. It is clear to this Court that several genuine issues of material fact exist in this case in regard to separate defendants, Vermillion County, Indiana, and the Commissioners of Vermillion County, Indiana. The Court will refer herein to these separate defendants as the "county defendants" for brevity.

5. Initially, the rationale for reconsidering the issue of summary judgment was the fact that this Court based its prior Order on an incorrect statute. In this regard, the Court assumed that the governing board of the Vermillion County Hospital was created under I.C. 16-22-2-5(b). Under this statute, the three county commissioners were automatically members of the hospital governing board and hence would have direct involvement in the operation of the county hospital.

6. The defendants have indicated to the Court that the correct statute to be applied is I.C. 16-22-2-6. Under this statute, the hospital governing board is appointed by the county executive, but does not by statute, necessarily include the three commissioners as members of the board.

7. The defendants argue to this Court that the governing board of the hospital is the supreme authority over the hospital (see I.C. 16-22-3-1) and that accordingly, the county defendants cannot be liable to the plaintiffs under either of the plaintiffs claims herein, to wit: the Section 1983 action or the civil tort claim.

8. The Court concludes that upon examination of the authorities cited by the parties as well as the statutes governing the county executive's relation to county hospital, the Court's original conclusions remain the same, specifically, the involvement of the county executive in setting policy for the operation of the hospital and/or its control over the governing board demonstrate that genuine issues of material fact exist in this case. In this regard, it is clear under I.C. 16-22-2-6 that the commissioners exclusively appoint the members of the governing board, unlike other county boards which are appointed by a number of appointing authorities. E.g. county community corrections boards, see I.C. 11-12-2-2; the community child protection team, see I.C. 31-33-3-1; and public library boards, see I.C. 20-14-2.5-4. Additionally, the county executive under I.C. 16-22-2-7 can increase and decrease the size of the board, and under I.C. 16-22-2-9 (d) can remove members from the board for not performing their duties.

9. Further, while I.C. 16-22-3-1 makes the governing board the supreme authority in the hospital, the county executive's input and approval is still required for certain decisions affecting the operation of the hospital, e.g. the disposition of real property and certain lease arrangements, I.C. 16-22-3-17 as well as the transfer of assets or management of the hospital to a nonprofit corporation or related hospital entity, I.C. 16-22-3-18. In regard to I.C. 16-22-3-18, the county executive is a necessary party to the

determination of whether hospital services could be best provided by another entity. For these reasons, the Court concludes that Indiana law does not provide for the complete abdication of all responsibility for county hospitals to the governing board as asserted by the county defendants, but makes the county executive an integral part of the operation of a county hospital.

10. The plaintiffs have argued that the county defendants are liable on plaintiffs' claims due to the involvement of the county health officer in the operation of the Vermillion County Hospital. The Court's reaffirms its original ruling in this regard. Based upon the evidence in this case, there exist genuine issues of material fact in regard to the actions and duties of the county health officer in this case as well as his role as a policy maker for the county defendants.

11. In summary, the Court's original conclusions in regard to the matter of summary judgment on the plaintiffs' Section 1983 claims remain the same. The Court agrees that *Monell v. Dept. of Social Services* 436 U.S. 658, 98 S.Ct. 2018 (1978) stands for the proposition that the county cannot be held liable for the acts of a lower-level employee on a theory of respondeat superior. However, the county can be liable for conduct officially sanctioned by municipal actors or policy-makers through direct action or custom. See *Pembaur v. City of Cincinnati* 475 U.S. 469, 106 S.Ct. 1292 (1986). Thus the actions of the county executive and the county health officer in causing the damages claimed by the plaintiffs present genuine issues in this case.

Appendix C

12. For all of these reasons, the Court again finds that genuine issues fact exist in regard to the claims made by the plaintiffs under 42 U.S.C. Section 1983 and that the county defendants are not entitled to judgment as a matter of law. The Court denies the Second Motion for Summary Judgment in regard to the plaintiffs' claims under 42 U.S.C. Section 1983.

13. The remainder of the Second Motion for Summary Judgment addresses the tort claims made by the plaintiffs. In this regard, the county defendants assert immunity under I.C. 34-13-3-3(7), which provides that a governmental entity is not liable if a loss results from:

"(7) the adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or false imprisonment."

14. A governmental entity is subject to liability for torts committed by their employees or agencies unless one of exceptions under the Indiana Torts Claim Acts apply. See *Mullin v. Municipal City of South Bend* (Ind. 1994), 639 N.E. 2d 278.

15. "Our Supreme Court has explained that the scope of "enforcement" extends well beyond traditional law enforcement activities, but is "limited to those activities in which a governmental entity or its employees compel the obedience of another to laws, rules or regulation, or sanction or attempt to sanction a violation thereof. *Minks v. Pina* (Ind. App. 1999), 709 N.E. 2d 379 at p. 382, citing *Mullin*, supra.

16. At issue in this case is the alleged failure of the county defendants to comply with Indiana law and administrative rules and regulations and not with the enforcement of law against third parties. The Court accordingly concludes that the county defendants are not immune under the Indiana Torts Claim Act as alleged.

17. The defendants further argue that the plaintiff's tort and wrongful death claims are barred because they were not filed within the applicable statutes of limitations. In this regard, the law is with the plaintiffs for the reasons asserted by the plaintiffs.

18. The last remaining issue raised by the Second Motion For Summary Judgment concerns the failure on the part of certain plaintiffs to file tort claims notices. In its Order of March 23, 2000, this Court erred when it found that all plaintiffs had filed such notices. As asserted by the defendants, some plaintiffs timely filed their notices, some filed their notices after the statutory deadline, while others did not file notices at all.

19. Under I.C. 34-13-3-8 a claim against a political subdivision of this State is barred unless a tort claim notice is filed with the appropriate government body within 180 days after the loss occurs.

20. The Court reaffirms its prior ruling that the plaintiffs were not required to file tort claims notices as a prerequisite to their Complaint under 42 U.S.C.

Section 1983. Such notices are not required for such an action. These notices, however, are required by Indiana law in tort actions. The plaintiffs argue that Indiana law requires substantial compliance with the notice requirements, but does not require written notice. However, all of the cases cited by the plaintiffs which supported a waiver of the written notice requirement involved direct negotiations and communications between the parties about a specific claim of loss. There has been no such proof in this case in regard to those plaintiffs who did not file tort claim notices. The Court accordingly finds that no genuine issues of material fact exist in regard to the tort claims of those plaintiffs who failed to file any written notice of their claims pursuant to statute. The county defendants are entitled to judgment on those limited claims as a matter of law.

21. Genuine issues exist in regard to whether those plaintiffs who filed their tort notices after this statutory deadline have substantially complied with the notice requirements. The evidence suggests that these plaintiffs filed their notices in a timely manner after they discovered the basis for their cause of action. Further in regard to the claim of Jerry Sims, the evidence indicates that he is now the personal representative of the estate of Joann Sims. His claim should not be barred due to failure to file a written notice because such a notice was filed on behalf of the estate of JoAnn Sims by Erma Sims. The county defendants are not entitled to judgment as a matter of law in regard to these plaintiffs.

For all of these reasons, the Court now reaffirms those portions of its Order of March 23, 2000, which are not inconsistent with this Order.

The Court for the reasons stated herein, grants the Second Motion for Summary Judgment in regard to the tort claims of those plaintiffs who did not file any notice as required by I.C. 34-13-3-8. The Court finds that no reason exists to delay entry of this judgment. The Court accordingly enters Summary Judgment in favor of Vermillion County, Indiana, and the Commissioners of Vermillion County, Indiana, and against the following plaintiffs in regard to said plaintiffs' tort claims only:

> Malcolm Aukerman, Rebecca Batson, Robert Meadows, Robin Berg, Loretta Blackburn, Kathryn Bricker, Derek Maxwell II, Viola Chrimes for Laura Malkin, Tonya Cotterell, Mildred Genisio, Michael Gilman, Roger Griffin, Bruce Hafner, Brenda Henderson, Lorie Hickman, Evelyn Holbert, James Huxford, John Lee, James Lee, Richard Marshall, Jr. Gloria McGill, Sue Mershon, Rodney Meyers, Norman Miller, Nellie Norman, Lance Pefley, Junior Pressley, Jr., Ethel Richardson, Dom Rolando, Mildred Smith, James Stilwell, David Wheeler, Scott White, Marilyn Whittington and Marilyn Wolfe.

The Court denies the county defendants' Second Motion for Summary Judgment in all other regards.

Appendix C

The Court schedules this cause for oral arguments on the defendants' Motion for Bifurcation and Separation of Trials and further pre-trial conference for April 1, 2002 at 11:00 a.m. This hearing will be held in the Owen Circuit Court.

All Ordered this 9th day of January, 2002.

s/ Frank M. Nardi
Frank M. Nardi, Special Judge
Vermillion Circuit Court

APPENDIX D — INDIANA SUPREME COURT DECISION DENYING TRANSFER OF JURISDICTION DATED SEPTEMBER 26, 2003

CLERK

SUPREME COURT, COURT OF APPEALS,
AND TAX COURT

STATE OF INDIANA

217 State House, Indianapolis, IN 46204

317-232-1930 • Fax 317-232-8365

Colleen McNenny Shere
Acting Clerk

Cause Number
83A05-0207-CV-00335
Lower Court Number:
83C019508CT6

VERMILLION COUNTY, ET AL.
-V- VICORY, SUSAN, ET AL.

You are hereby notified that the SUPREME COURT has on this day 9/26/03

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION

OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLEE'S PETITION TO TRANSFER OF JURISDICTION.

RANDALL T. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR EXCEPT FOR DICKSON, J., WHO VOTES TO GRANT TRANSFER. MS

WITNESS my name and the seal of said Court,
this 26TH day of SEPTEMBER, 2003

s/ Colleen McNenny Shere
Acting Clerk, Supreme Court,
Court of Appeals and Tax Court

APPENDIX E — EXCERPTED FROM BRIEF OF APPELLEES, PP. 7-11, FILED IN THE INDIANA COURT OF APPEALS, FEBRUARY 5, 2003, AND CITED TO THE SUPREME COURT OF INDIANA IN THE PETITION TO TRANSFER FILED JUNE 23, 2003

* * *

III. STATEMENT OF FACTS

Vermillion County Hospital (VCH) was a 62 bed facility with 6 nursery beds and 56 acute adult/pediatric beds. There were 4 intensive care unit beds with three in an open room and one bed in isolation. (Appellees' App. p. A-167; Lamm Study, p. 4) VCH is a public facility and is regulated by the Indiana State Department of Health. (Appellees' App. p. A-276, A-278; Deposition of Dr. Franklin Swaim, pp. 54, 132)

In February, 1993, VCH rehired a licensed practical nurse, Orville Lynn Majors ("Majors"). (Appellees' App. p. 282; Majors Dep. p. 128) The personnel file of Majors at VCH demonstrates that the hospital terminated Majors on May 23, 1991 with a recommendation not to rehire him. However, VCH rehired Majors on February 1, 1993. (Appellees' App. p. A-284; Majors Dep. Ex. 4) LPN Orville Lynn Majors worked a total of 1614.4 hours in 1994. (Appellees' App. p. A-101; State v. Majors Probable Cause Affidavit p. 3) During those hours he experienced 79 codes, or one every 20.4 hours he worked. (*Id.*) In 1993, Majors worked 837.9 total hours and had 20 codes that year or one every 40.1 hours he worked. (*Id.*) Ultimately, the death rate in the ICU went from 25 in 1992 to 31 in 1993 to 101 in 1994. (*Id.* at 2).

Appendix E

At the time the death rate increased to epidemic levels, the number of patients being admitted to the ICU was decreasing in comparison to prior years. (Appellees' App. p. A-100; State v. Majors Probable Cause Affidavit, p. 2) The admissions to ICU went down from 393 in 1990 to 351 in 1994.

In the pre-Majors years of 1990, 1991 and 1992, the deaths occurring in the ICU were 29, 25, and 26, respectively. However, after Majors was rehired, the death rate increased to 101 for calendar year 1994. Dr. Lamm concluded that the death rate increased so dramatically that it constituted an epidemic by July of 1994. (Appellees' App. p. A-174; Lamm Study, p. 11) Lamm's Study also indicated that during the epidemic period the deaths were almost all during the daytime when Majors worked. (Appellees' App. p. A-174; Lamm Study, p. 11) The Lamm study, conducted by Dr. Steven Lamm, is an independent epidemiology study commissioned by the team investigating the deaths at Vermillion County Hospital. (Appellees' App. p. A-104, State v. Majors Probable Cause Affidavit, p. 6)

One of the chief admitting physicians, and a member of the Medical Services Committee (the "Committee") was supposed to review the death charts. Dr. John Franklin Swaim ("Swaim") testified he was never aware of a single suspicious death. (Appellees' App. p. A-277; Swaim Dep., p. 66) Dr. John Albrecht, the County Health Officer, was typically the only physician who attended the Service of Medicine Committee meetings. (Appellees' App. p. A-267, Albrecht Dep. p. 24.) The County Health Officer necessarily had the same facts that Dr. Lamm later reviewed, showing

that there was a mortality epidemic at Vermillion County Hospital. (Appellees' App. p. A-170; State v. Majors Probable Cause Affadivit, Lamm Study, p. 7)

In a survey of VCH conducted by the State on April 5, 1995, the State survey team found that the Committee of which County Health Officer Dr. Albrecht was the Chairman was composed of three physicians, who never reviewed patient charts at all. (Appellees' App. p. A-79; Ind. State Dept. of Health Survey Report, Notice and Order for Remedies, Ex. 3, p. 7) Rather, they directed the nursing supervisor to review the death charts and then present her findings to the Committee. (Appellees' App. p. A-89; Ind. State Dept. Health Survey Report, Ex.3, p.17)

During the time period of May 1, 1993 to December 31, 1994, reports to the governing board on inpatient deaths were not reviewed according to the bylaws, rules and regulations of VCH. During this period, inpatient deaths at the hospital nearly doubled and ICU deaths nearly quadrupled. The State survey shows that total deaths at the hospital were as follows: 1990-90; 1991-83; 1992-91; 1993-87; 1994-160. (Appellees' App. p. A-79; Ind. State Dept. Health Survey Report, Ex. 3, p. 7)

VCH supposedly had an admission assessment policy which required a registered nurse to assess the patient within five minutes of arrival in the ICU. Of the twenty-three closed patient records reviewed by the State surveyors, none of the twenty-three had admission assessments provided by an RN and all twenty-three had admission assessments done by an LPN such as Majors. (Appellees' App. p. A-92, A-95;

Ind. State Dept. Health Survey Report, Notice and Order for Remedies, Ex. 3, pp. 20, 23) Further, the surveyors found that nursing staff failed to comply with drug storage and control requirements of State law. (Appellees' App. p. A-95; Ind. State Dept. Health Survey Report, Notice and Order for Remedies, Ex. 3, p. 23)

The surveyors found, in an interview with the administrator, John Ling, Jr., on April 5, 1995, that Ling had a "gut feeling" in November, 1994 that something was wrong in the ICU unit regarding code blue calls and unexpected deaths of patients. Although he heard an increase in code blue calls himself during that month, and admitted that this indicated the number was increasing, especially in the ICU, he did nothing. He did not contact the State Department of Health or even address the issue with the State survey team who visited VCH in December, 1994. There is no indication he ever reported the matter to the governing board, or even the Committee, which was supposed to be studying the death charts already, but was clearly not doing so. (Appellees' App. p. A-73; Ind. State Dept. Health Survey Report, Notice and Order for Remedies, Ex. 3, p. 1)

The County Health Officer, Dr. John Albrecht, was intimately involved in the day to day operations of Vermillion County Hospital. He leased office space from the hospital for about ten years after first coming to Clinton. (Appellants' App. pp. 159-160, 161; Albrecht Dep. pp. 5-6, 11-12) He has been on the hospital staff the entire time he has been Vermillion County Health Officer; staff since 1984, Vermillion County Health Officer since 1988. (Appellants' App. pp. 162, 163; Albrecht Dep. pp. 15,18) He has served

as Chief of the Medical Staff and has chaired the Medical Executive Committee, the Service of Medicine Committee, and the Pharmacy and Therapeutics Committee, and has been on the Utilization Review Committee and Records Committee. (Appellants' App. pp. 162-166; Albrecht Dep. pp. 17-32) No one ever told him to forget as County Health Officer what he learned on any of the committees. (Appellants' App. p. 165; Albrecht Dep. pp. 28-29) His role as County Health Officer included giving attention to any epidemic death rate due to communicable disease. (Appellants' App. p. 163; Albrecht Dep. p. 19)

* * * *